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9 **UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 DESERT SURVIVORS; CENTER FOR
BIOLOGICAL DIVERSITY; WILDEARTH
13 GUARDIANS; and WESTERN
WATERSHEDS PROJECT,

14 Plaintiff,

15 vs.

16 UNITED STATES DEPARTMENT OF THE
17 INTERIOR; and UNITED STATES FISH AND
WILDLIFE SERVICE,

18 Defendants.
19

Case No. 3:16-cv-01165-JCS

**PROPOSED DEFENDANT-INTERVENOR’S
NOTICE OF MOTION AND UNOPPOSED
MOTION TO INTERVENE;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: December 16, 2016
Time: 9:30 a.m.
Place: Courtroom G, 15th Floor
Judge: Hon. Joseph C. Spero

20 **NOTICE OF MOTION AND MOTION TO INTERVENE**

21 **To All Parties and their Attorneys of Record:**

22 **Please take notice** that on December 16, 2016, at 9:30 a.m., in Courtroom G, 15th Floor, 450
23 Golden Gate Avenue, San Francisco, California 94102, or as soon thereafter as the matter may be
24 heard, the State of Nevada will and hereby does move this Court to let the State intervene in this action.

25 This motion is made pursuant to Federal Rule of Civil Procedure 24, on the ground that the
26 Proposed Defendant-Intervenors have an interest in this action that will not be adequately represented
27 by the named Defendants, and that this interest is sufficient to warrant intervention as a matter of right
28 under Rule 24(a), or, alternatively, by permissive intervention under Rule 24(b).

1 This Motion is based upon this Notice of Motion and Motion, Memorandum of Points and
2 Authorities, Declarations of Tony Wasley and Shawn Espinosa, the records and files in this action, any
3 matters of which judicial notice may be taken, and on such additional papers and arguments as may be
4 presented at or before the hearing of this matter. Nevada’s proposed Answer is attached as Exhibit 1.

5 Nevada is informed by counsel for the United States that the federal government takes no position
6 on Nevada’s intervention. Plaintiffs inform Nevada’s counsel that they do not oppose Nevada’s motion.
7 Nevada, in turn, represents that its interest is to participate on the merits and ensure a speedy and efficient
8 determination of the case. To that end, Nevada (1) has no intention of seeking to move venue; (2) will not
9 take a position on Plaintiffs’ Motion to Produce Administrative Record, *see* Dkt. 34; and (3) intends to
10 adhere to the schedule as presently arranged by Plaintiffs and the U.S.

11 **MEMORANDUM OF POINTS AND AUTHORITIES**
12 **IN SUPPORT OF UNOPPOSED MOTION TO INTERVENE**

13
14 **ISSUE TO BE DECIDED**

15 Whether Proposed Defendant-Intervenor State of Nevada meets the requirements of Federal
16 Rule of Civil Procedure 24 to intervene in this lawsuit.

17 **STATEMENT OF RELEVANT FACTS AND**
18 **INTEREST OF PROPOSED DEFENDANT-INTERVENOR**

19 Nevada seeks to intervene in this suit to defend its unique interests in the action’s subject matter
20 and to protect its authority to conserve the Bi-State Sage Grouse. This species of bird, *centrocercus*
21 *urophasianus*, has been the object of Nevada conservation efforts for years. In early 2002, the State, led
22 by its Governor, created a group that initiated a multi-year effort to produce a lasting, effective
23 conservation plan for the bird. By 2011, Nevada and California, along with directors of five federal
24 agencies—the U.S. Fish and Wildlife Service, Bureau of Land Management, U.S. Forest Service,
25 Natural Resources Conservation Service, and U.S. Geological Survey—formed an oversight committee
26 to unite the crucial parties to intelligently safeguard the species. This culminated in the 2012 Bi-State
27 Action Plan. In April 2015, the U.S. Fish and Wildlife Service, acting partially in response to this
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1 unprecedented commitment, withdrew a proposed rule from October 2013 to list the bird as threatened.¹
 2 Plaintiffs challenge this 2015 determination. If successful, Nevada may be dispossessed of its devoted
 3 stewardship of the species and years of Nevada efforts and expenditures would be nullified.

4 ARGUMENT

5 **I. Nevada, under Rule 24, should be granted intervention as a matter of right.**

6 Rule 24(a) permits intervention as of right where applicants (1) file timely applications; (2)
 7 possess a significantly protectable interest relating to the property or transaction that is the subject of the
 8 action; (3) face the prospect of practical impairment of that interest, without intervention, by the action's
 9 disposition; and (4) their interest is not adequately represented by existing parties. The Ninth Circuit
 10 recognizes that Rule 24 is interpreted in favor of liberal application and based on practical, equitable
 11 considerations, since openness to intervention serves the efficient resolution of issues and broadens access
 12 to courts.² Government entities generally have direct, manifest interests in Endangered Species Act cases
 13 like this one.³ For this reason, district courts in most cases admit states to these proceedings.⁴

14 **A. Nevada's application is timely.**

15 Timeliness is determined based on an evaluation of (1) the stage of proceeding in which
 16 intervention is sought; (2) prejudice to other parties; and (3) the reasons for and length of any delay.⁵
 17 Nevada's application is timely. The case is in its early stages. The complaint was filed in March 2016
 18 and the initial case management conference was held in July. To date, the docket largely involves
 19 procedural arguments. The parties' merits briefing is now off calendar entirely. Dkt. 33. Granting
 20 Nevada's motion will not prejudice any party, since it precedes discovery and hearings, briefing, or
 21 rulings on merits matters.

22 _____
 23 ¹ 80 FR 22828-01, withdrawing 78 FR 64358-01.

24 ² *Wilderness Socy. v. U.S Forest Serv.*, 630 F.3d 1173, 1177-79 (9th Cir. 2011) (en banc); *Citizens for*
 25 *Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011).

26 ³ *United States v. State of Or.*, 745 F.2d 550, 553 (9th Cir. 1984) ("There is no serious dispute that Idaho has
 27 interests which may be affected by the disposition of this litigation").

28 ⁴ *See, e.g., Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 15-CV-05754-JST, 2016 WL
 1394355, at *1 (N.D. Cal. Apr. 7, 2016); *Defs. of Wildlife v. Jewell*, No. 14-247-M-DLC, Dkt. 33 (D. Mont. Mar.
 10, 2015); *W. Watersheds Project v. U.S. Fish & Wildlife Serv.*, No. 4-cv-10-229-BLW, 2011 WL 2690430, at *4
 (D. Idaho July 9, 2011); *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 8, 18 (D.D.C. 2010); *Inst. For Wildlife*
Prot. v. Norton, 02-cv-01404-MJP, Dkt. 35 (W.D. Wash. 2003 Mar. 6, 2003).

⁵ *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995).

1 **B. Nevada has the requisite interest in the subject of this case.**

2 An applicant has a “significantly protectable interest if the interest is protected by law and there
3 is a relationship between the legally protected interest and the plaintiff’s claims.”⁶ This is a “practical,
4 threshold inquiry” and “no specific legal or equitable interest need be established.”⁷ Nevada’s interest is
5 naturally connected to the challenged decision of the U.S. Fish and Wildlife Service to withdraw its
6 proposed listing of the Bi-State Sage Grouse as a threatened species.

7 First, Nevada seeks to be a party in order to be in a position to present evidence, if necessary, to
8 support the U.S. Fish and Wildlife Service’s April 2015 decision to withdraw its proposed listing. That
9 decision was taken in part as a result of Nevada’s science, expertise, and efforts.⁸ Moreover, Plaintiffs’
10 challenge the “implementation” and “effectiveness” of existing “conservation efforts,” among them
11 those of Nevada.⁹ Nevada has a direct stake in this case, because a consequence could be the removal of
12 state authority over a species that Nevada and its Department of Wildlife have spent years defending.¹⁰
13 This interest is at its most acute now, because Nevada is a signatory to the 2012 Bi-State Action Plan at
14 the heart of this case; the State helped craft the conservation plan that relieved the Service from any
15 need to list the species. This plan took years to develop.¹¹ As stated in the declaration of Tony Wasley,
16 Director of the Nevada Department of Wildlife and Co-Chair of the Executive Oversight Committee for
17 Conservation of the Greater Sage Grouse, the Plan commits \$45 million to conservation.¹² Nevada has
18 already spent \$2 million and its commitment will ultimately exceed that made for any other species,
19 ever.¹³ The Department of Wildlife has six biologists who work on the Bi-State Sage Grouse and
20 together they have devoted hundreds of hours to this work.¹⁴ No species has received more
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24 ⁶ *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004)

25 ⁷ *Citizens for Balanced Use*, 647 F.3d at 897 (quotations and brackets omitted).

26 ⁸ Declaration of Shawn Espinosa, filed concurrently, at ¶ 10.

27 ⁹ *See, e.g.*, Compl. at ¶ 87-88.

28 ¹⁰ Espinosa Decl. ¶ 6-8.

¹¹ *Id.* at ¶ 8-9.

¹² Declaration of Tony Wasley, filed concurrently, at ¶ 6; Espinosa Decl. ¶ 8-9.

¹³ Wasley Decl. ¶ 6, 12.

¹⁴ Wasley Decl. ¶ 12.

1 conservation attention by the Department of Wildlife than the Bi-State Sage Grouse.¹⁵ Nevada’s efforts
2 in this respect are ongoing, including its 2015 progress report.¹⁶

3 Second, important federalism interests arise. The U.S. Department of Interior, which includes
4 the Department of Fish and Wildlife, considers it a general principle that Congress, despite
5 constitutional power over wildlife on federal lands, “has, in fact, reaffirmed the basic responsibility and
6 authority of the states to manage fish and resident wildlife on Federal lands” and considers State
7 jurisdiction “concurrent” with Federal authority” with respect to animals like the sage grouse.¹⁷ The
8 Endangered Species Act commands the Secretary of the Interior to “cooperate to the maximum extent
9 practicable with the States” in matters like management and cooperative agreements.¹⁸ Nevada, for its
10 part, deems state wildlife “part of the natural resources belonging to the people of the State of Nevada”
11 and has declared its commitment to that wildlife’s “preservation, protection, management and
12 restoration.”¹⁹ With respect to the Bi-State Sage Grouse, in particular, this litigation bears on numerous
13 Nevada statutes and regulations.²⁰ Again, if the bird is listed under the Endangered Species Act as
14 threatened, Nevada’s authority over this species may be permanently displaced.²¹

15 Third, Nevada has interests outside of wildlife protection that could be affected by the litigation.
16 A listing of a species as threatened, or designation of critical habit, can impose strictures that
17 significantly limit state action and impose consultation duties. This might cause disruption to local land
18 use plans, cut off residential development and commercial investment, and harm recreational interests.²²

19 Fourth and finally, by permitting intervention, this Court will ensure that Nevada can participate
20 in negotiations and discussions that might modify current conservation efforts on the same basis as
21 other participants. Nevada would also, once a party, be able to invoke the district court’s jurisdiction to
22 secure adherence to orders of the district court.

24 ¹⁵ *Id.* at ¶ 12.

25 ¹⁶ Espinosa Decl. ¶ 11.

26 ¹⁷ 43 C.F.R. § 24.3(b) & (c).

27 ¹⁸ 16 U.S.C. § 1535.

28 ¹⁹ Nev. Rev. Stat. Ann. § 501.100(1) & (2).

²⁰ *See, e.g.*, NRS 501.110 (providing for classification of wildlife as sensitive, threatened, or endangered);
NRS 503.584 (declaring State’s intent to protect Nevada native species).

²¹ Wasley Decl. ¶ 9.

²² *Id.* at ¶ 11.

1 **C. Case disposition may, as a practical matter, substantially impair Nevada’s interests.**

2 A party who may be substantially affected in practical terms by the determination made in an
3 action is generally entitled to intervene.²³ This impairment requirement is met if the injunctive relief
4 sought by plaintiffs will have direct, immediate, and harmful effects upon a third party’s legally
5 protectable interests.²⁴ Nevada would be injured by any invalidation (or, potentially, modification) of
6 the U.S. Fish and Wildlife’s Service’s April 2015 action.

7 First, Plaintiffs’ action, if successful, might effectively remove the Bi-State Sage Grouse from
8 Nevada’s primary jurisdiction and management and make superfluous the hard-won Bi-State Action Plan.
9 The Endangered Species Act generally preempts state authority.²⁵ Not only would a listing withdraw from
10 Nevada and its Department of Wildlife a responsibility they have honored for decades, it would be no less
11 than a declaration that Nevada had failed.²⁶ Further repercussions include the cutting off or severe
12 limitation of state conservation efforts that remained permitted. For instance, a listing could significantly
13 hinder Nevada’s beneficial removal of encroaching pinyon and juniper trees, create cumbersome hurdles
14 to Nevada’s Bi-State Sage Grouse study and monitoring (which has gone on for nearly 70 years), and
15 disrupt the engagement with land owners and others that make conservation effective.²⁷

16 Second, Nevada, unless permitted to intervene, may be prejudiced if a settlement were reached,
17 since it would lack party status in the case.²⁸ The agency action at issue here was prompted, in part, by
18 Nevada’s efforts. It would damage Nevada interests if the State, after having influenced favorable
19 federal action, were now excluded from proceedings that may dismantle that favorable action.

20 **D. Nevada’s interests are inadequately represented by existing parties.**

21 The requirement to inadequate representation is “minimal”; the applicant for intervention need
22 only show that representation of its interest by existing parties “may be inadequate.”²⁹ In making this
23 determination, courts consider: (1) whether the interest of a present party is such that it will undoubtedly
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25 ²³ *Sw. Ctr. for Biological Diversity v. Burg*, 268 F.3d 810, 822 (9th Cir. 2011).

26 ²⁴ *Id.* at 818; *see also United States v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988).

27 ²⁵ *Nat’l Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 852 (9th Cir. 2002), *opinion amended on denial of reh’g*,
312 F.3d 416 (9th Cir. 2002); 16 U.S.C. § 1535(f) (barring less restrictive state measures).

28 ²⁶ Wasley Decl. ¶ 9.

²⁷ *Id.* at ¶ 10, 4, 9, 14.

²⁸ *Id.* at ¶ 5.

²⁹ *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823.

1 make all the intervenor’s arguments: (2) whether the present party is capable and willing to make such
 2 arguments; and (3) whether the would-be intervenor would offer any necessary elements to the
 3 proceedings that other parties would neglect.³⁰ The U.S. is aligned with Nevada in a Bi-State Sage Grouse
 4 policy partnership, and shares with Nevada the goal of upholding the Service’s decision here, but it does
 5 not itself represent Nevada’s interests, nor can it bring identical arguments and evidence.

6 First, the Service largely seeks to vindicate its administrative process that led to the decision not
 7 to list the Bi-State Sage Grouse under the ESA. But Nevada seeks, more broadly, to retain its power to
 8 manage the bird and its habitat within its borders, under its own state laws, as it is now doing.

9 Second, Nevada’s absence from this litigation may deprive this Court of a complete factual basis
 10 to thoroughly assess the data and science used by the Service (such as on the question of whether it was
 11 the “best available”) and on the certainty of implementation and effectiveness of conservation efforts
 12 (such as on the question of whether the Action Plan addresses the right risks or whether the
 13 implementation commitments are genuine).³¹ These may be elements of inquiry for the Court.³² The U.S.
 14 defendants may not have access or incentive to present materials possessed by Nevada officials, including
 15 materials to rebut evidence plaintiffs may present in attacking the Service’s decision. When it comes to
 16 experience and technical knowledge of the Bi-State Sage Grouse, no organization exceeds the Nevada
 17 Department of Wildlife.³³ The Service relies on its data.³⁴ For instance, the 2014 “Coates” study criticized
 18 by plaintiffs, and cited a dozen times in the April 2015 rule, was prepared in cooperation with the Nevada
 19 Department of Wildlife.³⁵ The Department has monitored sage grouse and leks since the late 1940s and
 20 possesses nearly 70 years’ worth of data.³⁶ The Department has 15 years’ worth of specialized studies of
 21 the Bi-State Sage Grouse, gathered by biologists using surveys on leks, brood, capture and radio-marking,
 22 harvest questionnaire and wing analyses, or aerial and ground surveys.³⁷ Nevada specialists’ research
 23 includes sage grouse movement, age structure, extent and range, genetic make-up, habitat requirements,

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 25 ³⁰ *Id.* at 822.

³¹ Wasley Decl. ¶ 5, 7.

³² *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1123 n.14 (9th Cir. 2012).

³³ Wasley Decl. ¶ 4; Espinosa Decl. ¶ 2-4.

³⁴ Wasley Decl. ¶ 4; Espinosa Decl. ¶ 4.

³⁵ Compl. at ¶ 80(c); *see* 80 FR 22828-01 at 22830-32; *see* goo.gl/VpRw27 (Coates et al. study).

³⁶ Wasley Decl. ¶ 4.

³⁷ Wasley Decl. ¶ 4; Espinosa Decl. ¶ 4

1 and predator and hunting impacts.³⁸ As to conservation efforts, plaintiffs' allegations include the
 2 assertions that the current conservation efforts for the Bi-State Sage Grouse in the Action Plan may be
 3 unimplemented or ineffective.³⁹ Nevada should be permitted to proffer evidence or materials in response
 4 to this allegation and to better inform the Court in making its disposition.

5 **E. In the alternative, Nevada should be granted permissive intervention.**

6 Nevada has demonstrated interests that warrant intervention as of right. Nevertheless, in the
 7 alternative, this Court should allow permissive intervention under Rule 24(b). This is granted when the
 8 applicant (1) demonstrates independent grounds for jurisdiction; (2) files a timely motion; and (3)
 9 presents a claim or defense that shares a common question of law or fact with the main action.⁴⁰

10 Nevada's claim is timely and, as to jurisdiction, could be the subject of an independent action to
 11 challenge the listing if the plaintiffs were to prevail. Letting Nevada participate in this litigation would
 12 prevent serial litigation and better serve the parties and the Court, which can hear from all those interested
 13 and resolve the issues with a judgment binding all parties. Furthermore, Nevada's anticipated defense—
 14 that the agency reached the appropriate decision in denying a listing to the Bi-State Sage Grouse⁴¹—and
 15 the main action pending have questions of law and fact in common, for instance whether the agency acted
 16 in an arbitrary and capricious manner and whether it considered the best scientific evidence available.
 17 Nevada may also present legal argument based on Nevada law that would not likely otherwise be
 18 presented in the proceeding.

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27 ³⁸ Wasley Decl. ¶ 4.

³⁹ See, e.g., Compl. at ¶ 87-88.

⁴⁰ *U.S. v. City of Los Angeles*, 288 F.3d 391, 403 (9th Cir. 2002).

⁴¹ Wasley Decl. ¶ 8; Espinosa Decl. ¶ 12.

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CONCLUSION

The State of Nevada respectfully requests the Court grant its Motion to Intervene as a defendant in this matter.

Dated: November 4, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2016, I electronically filed the foregoing PROPOSED DEFENDANT-INTERVENOR’S NOTICE OF MOTION AND UNOPPOSED MOTION TO INTERVENE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF with the Clerk of the Court using the CM/ECF system.

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